BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International	)	
Inc.	)	WC Docket No. 02-89
	)	
Petition for Declaratory Ruling	)	
On the Scope of the Duty to File and	)	
Obtain Prior Approval of Negotiated	)	
Contractual Arrangements	)	
Under Section 252(a)(1)	)	

COMMENTS OF THE ATTORNEY GENERAL OF THE STATE OF NEW MEXICO AND THE IOWA OFFICE OF CONSUMER ADVOCATE

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Patricia A. Madrid, in her capacity as Attorney General of the State of New Mexico and John R. Perkins, in his capacity as Consumer Advocate for the State of Iowa, a division of the Iowa Department of Justice jointly submit these *Comments* pursuant to Federal Communications Commission's ("FCC" or "Commission") *Pleading Cycle Established For Comments On Qwest Communications International Inc. Petition For Declaratory Ruling On The Scope Of The Duty To File And Obtain Prior Approval Of Negotiated Contractual Arrangements Under Section 252(A)(1)* ("Pleading Cycle") in the above referenced docket.

INTRODUCTION

On April 23, 2002, Qwest Communications International Inc. ("Qwest") filed *Petition For Declaratory Ruling On The Scope Of The Duty To File And Obtain Prior Approval Of Negotiated Contractual Arrangements Under Section 252(A)(1)* with the

Commission ("Petition for Declaratory Ruling"). The *Pleading Cycle* defined the scope of Qwest's request as follows:

> Specifically, Qwest requests a declaratory ruling concerning which types of negotiated contractual arrangements between incumbent local exchange carriers (LECs) and competitive LECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of section 252(a)(1) of the Act – and which are not. Qwest states that timely guidance from the Commission is necessary to achieve a uniform interpretation of federal law and to avoid the application of inconsistent requirements to identical agreements and terms in multiple states. Qwest asserts that Commission guidance may also help ensure that Congress's objectives in the Act are not thwarted.

Pleading Cycle, p. 1.

It is not disputed there are agreements between Qwest and competitive local exchange carriers that were not timely filed with any state regulatory commission. Investigations into these unfiled agreements are currently being conducted in Minnesota, Iowa, Utah, New Mexico and other Qwest states. WALL STREET JOURNAL (Solomon, Deborah, *States Probe Deals Qwest Struck to Expand Long-Distance Service*, Wall Street Journal, Apr. 29, 2002; Sect. A:1 (col. 5)). What is disputed is Qwest's premise that there is any uncertainty as to which agreements between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are subject to mandatory filing before a state regulatory commission. State regulatory commission review of agreements will prevent discrimination against CLECs that are not a party to the agreement and, by doing so, protect the public interest. State regulatory commissions must review the agreements in conformity with the federal Telecommunications Act of 1996. Congress delegated authority to state commissions to review agreements, in part, because what is discriminatory in one region may not be discriminatory in another. *Cf.*

United States Telecom Association v. Federal Communications Commission, ___ F.3d ___, 2002 WL 1040574, at *7-9.

I. PURPOSE OF THE TELECOMMUNICATIONS ACT OF 1996 IS TO EFFECT TRANSITION FROM MONOPOLY TO COMPETITION

The purpose of the federal Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56 codified at 47 U.S.C. §§ 151 *et. seq.* (the "1996 Act" or "Act") is to transition a monopoly market to a competitive one. By entering into interconnection agreements, but not publicly disclosing them by filing them with state commissions for review, ILECs can further their monopoly power at the expense of the consumer and contrary to the express purposes of the Act.

"The 1996 Act itself was designed 'to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Goldwasser v. Ameritech Corporation*, 222 F.3d 390, 393 (7th Cir. 2000) *quoting* Preamble to the Act. "[I]ntended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises." *Verizon Communications Inc. v. Federal Communications Comm.*, __ U.S. ___, 2002 WL 970643, at *6, "the eventual hope was to transform the telecommunications market from a monopolistic, regulated one to a vibrant, competitive one." *Goldwasser*, 222 F.3d at 393 *citing AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999).

The Act, itself, "represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets." *Id*., 222 F.3d at 391. "But progress and change in such a complex industry do not occur overnight, and Congress

accordingly entrusted the Federal Communications Commission ("FCC") and the state public utility commissions with the task of overseeing the transition from the former regulatory regime to the Promised Land where competition reigns, consumers have a wide array of choice, and prices are low." *Id.* 222 F. 3d 391. The Act was designed by Congress to "foster immediate competition in the local telephone service market with the aim of transforming regulated, monopolistic telecommunications industry into a competitive open market." *Stein v. Pacific Bell Telephone Company*, 173 F. Supp.2d 975, 980 (N.D. Ca. 2001) *citing AT&T,* 525 U.S. at 371.

A. The Act Imposes Special Responsibilities on ILECs

To foster "immediate" market entry and competition, Congress determined it was necessary to impose a host of affirmative duties and responsibilities on the monopolists. *Stein*, 173 F. Supp.2d at 980 *citing AT&T* 525 U.S. at 371; *Goldwasser*, 222 F.3d at 392. In other words, the Act goes well beyond imposing a "simple antitrust solution to the problem of restricted competition in local telephone markets," such as compelling the monopolist to refrain from exclusionary practices. *Goldwasser*, 222 F.3d at 399. Congress, "[i]nstead, in an effort to jump-start the development of competitive local markets, [ ] imposed a host of special duties on the ILECs…" *Goldwasser*, 222 F.3d at 399.

The special duties include, but are not limited to, opening its network to competitors and an obligation to cooperate with potential competitors. *Stein*, 173 F.Supp.2d at 980. As an illustration, "[s]ection 251(c) provides detailed requirements for ILECs to cooperate with competitors or potential competitors to negotiate agreements in good faith to open up access to the ILECs equipment and telephone lines at reasonable

rates and terms. *Id.* "These are precisely the kinds of affirmative duties to help one's competitors that [ ] do not exist under the unadorned antitrust laws." *Goldwasser*, 222 F.3d at 400.

To accomplish what was hoped would be a rapid transformation to a competitive market, Congress "… entrusted supervision of those [special] duties to the FCC and the state public utility commissions…." *Id.* at 399. Congress also instituted a system of negotiated or arbitrated agreements through which this would be accomplished. *Id.* at 399-400. All agreements between ILECs and CLECs are subject to "[s]tate approval …to ensure that an agreement does not discriminate against other carriers which are not parties to the agreement, that implementation of the agreement is in the public interest, and conforms to the duties imposed on local exchange carriers by 47 U.S.C. § 251 and the pricing standards imposed by 47 U.S.C. § 252(d). 47 U.S.C. § 252(e)(2). This cannot be determined without a review of all agreements.

State regulatory commission review is an integral part of the scheme to ensure the transition to competition would be as expedient and open as possible. Secret agreements violate the duty to negotiate in good faith, compromise the role of state regulatory commissions and frustrate the transition to competition in the local market. This is nothing but common sense.

B. Filing Goes to the Heart of the Act

Section 251(a)(1) of the Act requires, in part, that all agreements reached through voluntary negotiations "shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1). Subsection (e) then provides, in part, that "[a] State commission to which an agreement is submitted shall approve or reject the

agreement, with written findings to any deficiencies." 47 U.S.C. § 252(e). Section 252(h) then requires that "[a] State commission shall make a copy of each agreement approved under subsection (e) of this section… available for public inspection and copying." 47 U.S.C § 252(h). Note, "agreement" in the above quoted passages of the Act is not modified by the word "interconnection." The language used by Congress supports a broad and inclusive construction that all agreements must be filed.

Section 252(h) requires all agreements to be filed. 47 U.S.C § 252(h). Filing goes to the heart of the Act's regulatory scheme, and is not simply a ministerial task. *Cf., John Q. Shunk Association, Inc. v. United States of America*, 626 F.Supp. 564, 567 (E.D. Ohio 1985). *Contra, Petition for Declaratory Ruling*, p. 5. Filing is not "only a procedural matter." *Petition for Declaratory Ruling*, p. 15.

To effectuate the purpose of the Act and its requirements to prevent discriminatory treatment of competitors, all agreements must be filed. *Accord, Petition for Declaratory Ruling*, p. 15. Qwest, in fact, makes a solid argument for requiring all agreements to be filed:

> To the extent that an ILEC and CLEC reach agreement on non-rate matters, the only relevant impact on a competing third party CLEC is that it has to ask for the same or similar arrangement. If the ILEC agrees (and Qwest for one tries to accommodate the specific requests of all its ILEC customers), that contract term can also take effect immediately with prior PUC review.

Petition for Declaratory Ruling, p. 17.

Once agreement has been reached, "any interconnection agreement," whether negotiated under Section 252(a)(1), or adopted by arbitration under 252(b) through (d), must be submitted to the state commission for approval in accordance with Section 252(e). This requirement is often referred to as the filing requirement. Section 252(h)

requires state commissions to make a copy of each agreement it approves available for public inspection and copying. In addition Section 252(i) requires each local exchange carrier to "make available any interconnection, service, or network element provided under an agreement approved under [Section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." This provision is often referred to as the "pick and choose" or "most favored nation" requirement.

The FCC observed that the "pick and choose" requirement imposed by Section 252(i) of the Act "appears to be a primary tool of the 1996 Act for preventing discrimination under Section 251." *First Report and Order*, at ¶ 1296. Qwest's arguments that the Act and sound public policy require that only a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement" be filed under Section 252 contradicts the plain meaning of the Act when read as whole.

C. Filing All Agreements Eliminates Word Games

Requiring the filing of all agreements would virtually eliminate the likelihood of abuse by ILECs or CLECs in self-determining which agreements should be filed. It would be a monumental undertaking for any regulatory agency to construct a definition that would not be replete with loopholes which could be exploited.

This would be true even if agreements subject to prior approval were only those agreements that contained a "detailed schedule of itemized charges" *Petition For Declaratory Ruling*, p. 4. The United States Supreme Court has previously construed and found similar arguments disingenuous: "If 'discrimination in charges' does not include

non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge…. An unreasonable 'discrimination in charges,' can come in the form of a lower price for equivalent service or in the form of enhanced service for an equivalent price." *AT&T v. Central Office Tel. Inc.*, 524 U.S. 214, 223 (1998). "Unsurprisingly, the cases decided under the [Interstate Commerce Act ("ICA") make it clear that discriminatory "privileges" come in many guises, and are not limited to discounted rates. '[A] preference or rebate is the necessary result of every violation of [the analog to § 203(c) in the ICA] where the carrier renders or pays for a service not covered by the prescribed tariffs." *AT&T*, 524 U.S. at 223-4.

Such is the case herein. Limiting "filing and approval" to only those agreements that contain a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement" would be little, if any, protection against favorable contract terms offered by Qwest to one CLEC to the detriment of other CLECs.

II. REGULATORY SCHEME PROVIDES FOR VOLUNTARY AGREEMENTS

A. Regulatory Scheme is Analogous to the Natural Gas Act

The United States Supreme Court put it bluntly: "It would be gross understatement to say that the [Act] is not a model of clarity." *AT&T,* 525 U.S. at 397. In these circumstances, one accepted method of interpreting a statute is to analogize the Act to other similar statutes. Courts have previously found that the Natural Gas Act was similar in many ways to the Communications Act of 1934.[1] *See, e.g., Verizon Communications* __ U.S. ___, 2002 WL 970643, at * 7-8; *Global Access Limited v. AT&T Corp.*, 978 F.Supp. 1068, 1073 (S.D.Fla. 1997); *In the Matter of American*

Telephone & Telegraph Co., Long Lines Department, FCC 72-619, 36 F.C.C.2d 484 (1972). The same holds true subsequent to the passage of the Act. *Id.; Mincron SBC Corporation v. WorldCom, Inc.*, 994 S.W.2d 785, 793 (Houston [1st Dist.] 1999).

The "voluntary arrangements" regulatory scheme that Qwest asserts is the touchstone of the Act is remarkably similar to the regulatory scheme of the Natural Gas Act ("NGA"). *See, e.g. Petition for Declaratory Ruling*, p. 7. Qwest argues that it is entitled to conduct business with CLECs through individual contracts. *Id.* The NGA permits rates to particular customers to be set by individual contracts. *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U.S.332, 338 (1956). In the NGA, Congress had recognized that circumstances could create the need for "individualized arrangements" between companies and distributors." *United Gas*, 350 U.S. at 339. Therefore, the process was designed to allow for the "relations of the parties to be initially established by contract." *United Gas Pipe Line Co.*, 350 U.S. at 339. This is not too dissimilar from Qwest's argument herein. However, to protect the public interest, Congress required all contracts be filed with the Federal Power Commission and made public. *United Gas Pipe Line Co.*, 350 U.S. at 339-40 ("the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.")

Requiring filing of all contracts was "not to abrogate private contracts as such, but to the contrary, it was to expressly recognize that individual contracts are fundamental to the natural gas industry." *United Gas Pipe Line Co.*, 350 U.S. at 338. Filing of individual contracts was to "protect against potential discrimination by favorable contract rates

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[1] The Communications Act of 1934 was amended, in part, by the Telecommunications Act of 1996.

between allied business to the detriment of other wholesale customers." *Verizon Communications*, ___ U.S. at ___, 2002 WL 970643, at *8.

B. Analogizing to a Tariff Scheme is Misleading

For the same reason set out above, Qwest's argument that if Congress had intended parties to file agreements it would have instituted a tariff-framework must fail. The recent decision of the United States Supreme Court in *Verizon Communications* clearly establishes Qwest's argument is superficial at best. There was no need for Congress to insist on a tariff-framework.

In *Verizon Communications* the Court recognized differences in the regulation of rates for transactions between firms in wholesale markets and rates charged to consumers by firms in retail markets. Tariff-based rate regulation was appropriate for regulating rates charged to the general public. The Court observed that businesses in wholesale markets enjoyed presumptively equal bargaining power, prompting Congress to use contracts negotiated by the commercial buyers and sellers as the basis for rate setting. *Verizon Communications*, __ U.S. at ____, 2002 WL 970643, at *8. Even in a regulatory scheme that encourages voluntary contracts between parties, state regulatory commissions have a role to prevent discrimination to the detriment of third-party competitors, the public interest and consumers. *Id.* This can only be accomplished if all negotiated agreements are filed and reviewed.

III. "ALL" AGREEMENTS MEANS ALL AGREEMENTS

The FCC explained in its *First Report and Order*:

> As a matter of policy. . .we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions

> should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. (Emphasis in original).

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *slip op.* ¶167 (FCC Aug. 8, 1996)(*First Report and Order*)(emphasis supplied).

The FCC identified the policy requiring all agreements to be filed as a tool to prevent discrimination against third parties.

> Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).
>
> Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could have agreements not to compete. In addition, if we exempt agreements between non-competing LECs, those parties might have a disincentive to compete with each other in the future, in order to preserve the terms of pre-existing agreements.

First Report and Order, *slip op.* ¶167.

The requirement that all agreements must be filed as an instrument to deter discrimination was reaffirmed by the FCC in its discussion of the merger of GTE Corporation and Bell Atlantic Corporation:

> The 1996 Act and corresponding Commission rules give incumbent LECs and their competitors certain latitude to enter into customized contractual arrangements, subject to section 252(i)'s requirement that any negotiated arrangement must be made available to all interested carriers in the same state upon the same terms and conditions. Section 252(a)(1) provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c)

> of section 251." Likewise, although section 252(e)(2)(B) requires a finding of compliance with section 251 when state commissions review arbitrated agreements, there is no corresponding requirement with respect to negotiated agreements. We note, however, that as AT&T points out, pursuant to section 252(e)(2)(A)(i), a state commission may reject a negotiated agreement if it finds that the agreement "discriminates against a telecommunications carrier not a party to the agreement."

Memorandum Opinion and Order, *In Re Application of GTE Corporation, Transferor and Bell Atlantic Corporation, Transferee*, CC Docket No. 98-184, 15 F.C.C.R. 14,032 (released June 16, 2000), ¶ 314 (emphasis supplied). "Thus, the commission in each state … must make its own assessment of whether [any negotiated agreement is…] discriminatory." *Id.*

Qwest does not necessarily dispute that the scope of Section 252 potentially encompasses all "negotiated contractual agreement between ILECS and CLECs." *See, e.g., Petition for Declaratory Ruling,* p. 3. (In phrasing the issue before the FCC, Qwest refers to "negotiated contractual agreements," without limitation to whether the agreements are "interconnection agreements.") Filing all agreements will inform other CLECs of all previously adopted contract provisions and that "[will] ensure[ ] that a CLEC always has the ability to seek contract provisions on any topic." *Petition for Declaratory Ruling*, p. 11. Filing will allow the state regulatory commission to prevent discrimination and permit other CLECs to request the same treatment. *Compare, Petition for Declaratory Ruling*, p.5. It will also insure there is no uncertainty about the "rules of the road." *Cf. Petition for Declaratory Ruling*, p. 9.

The breadth and scope of the agreements that must be filed and subject to public inspection is unlimited: any agreement between an ILEC and a CLEC. Requiring all agreements to be filed, and not just a very narrow subset of interconnection agreements

as determined by Qwest alone would be consistent with the purpose of the Act to transition to a competitive marketplace. If limitations exist on what to file, the limitations must be found in the Act. They cannot be unilaterally determined by Qwest.

IV. INTERCONNECTION AGREEMENTS ARE ALL ENCOMPASSING

Even if this Commission were to limit an ILEC's filing of negotiated agreements only to interconnection agreements, interconnection agreements are extremely broad in scope. Congress did not define in the Act what is an "agreement" or what is an "interconnection agreement" much as it did not define "contract" in the NGA. *United* Gas, 350 U.S. at 339. An interconnection agreement has been interpreted as nothing more than provisions in agreements between ILECs and CLECs that give the CLEC, as an emerging competitor, "the opportunity to compete in the manner contemplated by the Telecom Act." *U.S. West Communications, Inc. v. Hix*, 57 F.Supp2d 1112, 1120 (D. Co. 1999). Provisions in interconnection agreements are provisions, no matter how broad, that put competitors on equal footing with the ILEC. *U.S. West*, 57 F.Supp.2d at 1120. Workable interconnection agreements are agreements that "encourage meaningful and fair competition in the local market," limit the time in which the ILEC enjoys a competitive advantage, and accelerate the transition to a competitive market. *U.S. West*, 57 F.Supp.2d at 1120-21; *TCG Milwaukee, Inc. v. Public Service Comm. of Wisconsin*, 980 F.Supp. 992, 1000 (W.D. Wis. 1997)("An issue as broad and important to an interconnection agreement as to what parties will charge one another necessarily will include sub-issues that must be addressed by the arbitration panel in order to decide the larger matter. This is a common sense notion.")

The Act provides any agreement resulting from a "request for interconnection,

services or network elements" from a telecommunication carrier "shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1). "Any interconnection agreement" must be submitted for state commission approval under section 252(e)(1). 47 U.S.C. § 252(e)(1). The state commission must make a copy of "*each* agreement approved" under section 252(e) available for public inspection. 47 U.S.C. § 252(h). A local exchange carrier must make available "any interconnection service or network element provided under an agreement approved under" section 252 to any other competing carrier. 47 U.S.C. § 252(i). No exception or class of exceptions to the filing requirement was carved out by Congress. "Any" and "each" agreement must be filed, not just those that allegedly address core terms of interconnection. *U.S. West*, 57 F.Supp.2d at 1120-21.

Read together, the sections are part of a single statutory scheme under which all agreements may be established initially by ILECs and CLECs, by contract or otherwise, and are subject to review and modification by a state commission if found to be discriminatory. *Cf. United Gas Pipe Line Co.*, 350 U.S. at 341.

V. ILECs HAVE ALWAYS RESISTED FILING AGREEMENTS

The history of legal wrangling surrounding the "pick and choose" rule is instructive and highly relevant to the instant matter. First, it demonstrates the resistance of ILECs to the principles embraced by Section 252(i) and demonstrates a history of attempts to limit the ability of competitors to avail themselves of the pick and choose rule. Second, it demonstrates the understanding of the FCC and the United States Supreme Court that the ability of competitors to take advantage of individual terms and

arrangements already agreed to by other carriers is central to the ability of the Act to open local telephone markets and bring competition to those markets.

In order for competitors to have the ability to "pick and choose" the individual terms of prior agreements, the terms must be made public. In the event that individual terms for the provision of interconnection, service or network elements remain unfiled and unknown to potential competitors or new entrants, a "primary tool" of the Act, whose goal is to encourage competition and discourage discriminatory treatment of competitors, is entirely disabled.

One of the questions the FCC sought to answer in the First Report and Order is: "whether Section 252(i) permits requesting telecommunications carriers to choose among individual provisions of publicly-filed interconnection agreements or whether they must subscribe to an entire agreement." *First Report and Order*, at ¶ 1298. ILECs argued to the FCC that Section 252(i) should not be interpreted to allow competitive carriers to choose among individual provisions in filed agreements. *First Report and Order*, at ¶ 1303. Generally they argued that separate availability of individual provisions would skew the individualized nature of negotiations, slow negotiations by magnifying the importance of each individual term and encourage incumbents to offer only standardized high-cost packages. *First Report and Order*, at ¶¶ 1304-1305.

Others, including new entrants, argued that the Act allows competitive carriers to choose among individual provisions contained in publicly filed agreements and that this would lead to increased competition and lower prices. They argued that requiring carriers to accept an entire agreement would cause delay and foster discrimination by enabling incumbents to fashion agreements so no subsequent carriers could benefit from

them. Most importantly, they argued that the failure to make available individual terms of agreements would deter market entry by smaller competitors unable or unwilling to pay for all the elements contained in an entire agreement previously negotiated by a larger competitor. *First Report and Order*, at ¶ 1304.

The FCC concluded that carriers should be able to choose among individual provisions contained in publicly filed agreements, noting that Congress, by its precise wording of Section 252(i), had drawn:

> [A] distinction between any interconnection, service, or network elements provided under an agreement, which the statute lists individually, and agreements in their totality.

First Report and Order, at ¶ 1310.

Thus, the FCC concluded, it was individual terms for the provision of interconnection, service or network elements that must be made public and made available to other carriers. The FCC explained the policy basis for its choice, stating:

> We also choose this interpretation despite concerns voiced by some incumbent LECs that allowing carriers to chose among provisions will harm the public interest by slowing down the process of reaching interconnection agreements by making incumbent LECs less likely to compromise. In reaching this conclusion, we observe that new entrants, who stand to lose the most if negotiations are delayed, generally do not argue that concern over slow negotiations would outweigh the benefits they would derive from being able to choose among terms of publicly filed agreements. Unbundled access to agreement provisions will enable smaller carriers who lack bargaining power to obtain favorable terms and conditions-including rates-negotiated by large IXCs, and speed the emergence of robust competition.

First Report and Order, at ¶ 1313.

ILECs brought a legal challenge to FCC's interpretation of the "pick and choose" requirement, among other of the FCC's interpretations, and pursued consolidated appeals through the U.S. Circuit Court of Appeals for the Eighth Circuit and to the United States

Supreme Court. The Eighth Circuit vacated the FCC's "pick and choose" rule but the United States Supreme Court reinstated the rule, finding that it "tracks the pertinent statutory language almost precisely." *AT&T,* 525 U.S. at 396. Accordingly, both the FCC and the U.S. Supreme Court have ruled that the individual terms of agreements fulfilling an ILEC's diverse duties under Section 251 of the Act are required to be filed and available under the pick and choose rule. If all agreements are not filed with state commissions for approval, the ability of a CLEC to use the pick and choose rule is restricted. A CLEC can neither "pick" nor "choose" what it doesn't know about.

VI. QWEST RELIANCE ON CONGRESSIONAL INTENT IS MISPLACED

Without acknowledging that in general the legislative history reflected in a conference report does not control over the statute, *Sierra Club v. Clark*, 755 F. 2d 608, 615 (8th Cir. 1985), Qwest relies on an erroneous interpretation of congressional intent to support its argument that Section 252 only requires ILECs to file "a detailed schedule of itemized charges."

Qwest argues that, "in enacting a version of Section 252 drawn primarily from the Senate bill, Congress endorsed the view of the Senate Committee on Commerce, Science and Transportation, which stated that it intends to encourage private negotiations." Qwest cites to the Congressional Record for this proposition, specifically the House Conference Report dated January 31, 1996 (Telecommunications Act of 1996, Conference Report, H. Report 104-458) and the Senate Committee Report dated March 30, 1995 (S. 652, Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science and Transportation, S. Rep. No. 104-23).

Congress obviously intended the Act to encourage private negotiations. However, it does not follow, as suggested by Qwest, that by encouraging private negotiation, Congress also intended to limit or minimize the Act's filing requirements or the ability of CLECs to exercise their options under the "pick and choose" provisions of the Act. Indeed, the very same Reports cited by Qwest show that the compromise agreed to in Congress was that the Act would encourage private negotiation but would also specify that there must be certain minimum requirements for interconnection, as described in Section 251, that relate to the wide variety of ILEC duties that must be agreed to under the Act. These minimum requirements include interconnection, unbundled access to network functions and services, facilities, information, databases, and signaling, interconnection that is economically reasonable and at least equal in type, quality and price to that provided by the ILEC to others and itself, access at technically feasible point, access to poles, ducts and rights of way, number portability, local dialing parity, resale and sharing of services and network functions, and reciprocal compensation arrangements.

The very same Reports cited by Qwest to support its arguments reiterate that a state may reject an agreement negotiated under Section 252 (and relating to the duties set out in Section 251) if the state finds that the agreement discriminates against a carrier that is not a party to the agreement or if implementation of the agreement is not in the public interest. Most importantly, the very same Reports cited by Qwest summarize the requirement that states make "available for public inspection" agreements reached under Section 252. The Senate Committee Report goes on to state:

> New Section 251 (g)[codified as Section 252 (i)] requires a local exchange carrier to make available any service, facility, or function provided under

> an interconnection agreement to which that local exchange carrier is a party to any other telecommunications carrier that requests such service, facility, or function on the same terms and conditions as are provided in that agreement. The Committee intends this requirement to help prevent discrimination among carriers and to make interconnection agreements more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated.

S. 652, Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science and Transportation, S. Rep. No. 104-23, at ** (March 30, 1995).

A fair and complete reading of the Congressional Record indicates that Congress intended a wide variety of terms, provisions, services and arrangements, reflecting an ILECs Section 251 duties, to be negotiated in the agreements called for under Section 252. Most importantly, Congress intended that all agreements involving the wide range of an ILEC's duties under Section 251 must be disclosed and be publicly available so that other CLECs can "pick and choose" the terms of those agreements.

Congress intended the ”pick and choose” requirement to help prevent discrimination among carriers and to make interconnection more efficient. Qwest misconstrues the intent of the Congress by suggesting, as it has here, that Congress intended to promote efficiency by opting for private negotiations and by further suggesting that Congress therefore intended to limit or minimize the filing requirement and the ability of CLECs to pick and choose. The Congressional Record establishes the intent of Congress unequivocally. Qwest fails in its strained and unsupported suggestion that Congress intended the exact opposite of what Congress said it intended.

Only if the contracts are filed can a CLEC even know some of the possible arrangements that might be requested. *Petition for Declaratory Ruling*, pp. 5, 17. Qwest asserts that even if the agreements are not filed, other CLECs are not prevented from

requesting similar treatment. *Id.* But, obviously, it does completely hinder other CLECs from knowing what treatment is available, and, even if known, compromises the negotiating ability of other CLECs. The bargaining power of CLECs is increased if the agreements are filed and this will better encourage the development of competition.

VII. QWEST'S RHETORIC OF ADVERSE CONSEQUENCES IS NOT SUPPORTED

The adverse and unintended consequences of which Qwest cautions are neither adverse nor necessarily unintended. *Petition for Declaratory Ruling,* p. 17-18. The consequences of filing negotiated agreements minimizes the potential for Qwest to engage in discriminatory behavior by secretly favoring one CLEC over another. Whether the filing of all agreements "creates legal uncertainty" turns the notion of a fair, competitive market on its head. First, it should be noted that a regulatory scheme predicated on voluntary contractual agreements has worked, as Qwest concedes, in the interLATA market notwithstanding the ability of a regulatory commission to find the agreement discriminatory subsequent to filing. *Petition for Declaratory Ruling,* p. 17-12.

Qwest asserts further that "the Congressional emphasis on negotiated agreements would be undermined if all terms of all negotiated agreements had to go through a 90-day regulatory approval process." *Petition for Declaratory Ruling,* p. 17-18. However, it is not within the authority of the Commission to override the Act. *Sierra Club*, 755 F.2d at 615.

Qwest also argues that without prior approval it may find itself engaging in anti-competitive behavior. However, Qwest argues that were a state commission to take 90 days to review the agreement, this would be too long in the telecommunications world. Therefore, in its view, no regulatory review is appropriate. In other words, if Qwest were

discriminating between CLECs pursuant to a filed, but not yet approved, agreement, it would be the fault of the regulatory commission for not pointing it out sooner. *Petition for Declaratory Ruling*, pp. 17-8. The argument is specious, for there can never be a legitimate rationale for allowing an ILEC to discriminate between CLECs.

The benefits that would ensue, according to Qwest, if agreements did not have to be filed, include ILECs and CLECs being able to engage in rapid-fire contractual relationships. *Petition for Declaratory Ruling,* p. 17-18. Qwest's arguments are premised on the assumption that the market between ILECs and CLECs should be no different than the regulation applicable to a competitive market. *Petition for Declaratory Relief*, p. 18. However, Qwest's argument simply begs a question. If wholesale telecommunications markets were competitive, firms would engage in rapid-fire business relationships free from regulatory oversight because a competitive marketplace is, by definition, free from regulatory oversight. Once a competitive market has developed, firms will be able to contract with each other as the competitive marketplace dictates. However, there is no evidence the local market in New Mexico or Iowa have any of the characteristics of a competitive wholesale marketplace. When that day arrives the market would "permit normal unregulated business dealings between CLECs and ILECs in most cases." *Petition for Declaratory Ruling*, p. 9. Until then, all agreements must be filed.

Qwest premises its arguments on the existence of a "free market system" in the telecommunications market. Qwest's underlying assumptions of competition, is inconsistent with the premise of the Act: to effect a transition from a monopoly market to a competitive one. Until the market is competitive and the purposes of the Act are

achieved, there is no rational argument for the limited regulatory backstop that Qwest is seeking. *Petition for Declaratory Relief*, pp. 8, 18.

VIII. QWEST'S PROPOSAL FOR FILING ONLY CERTAIN AGREEMENTS IS WITHOUT SUPPORT IN LAW AND TROUBLESOME IN PRACTICE

Within the process set out by Congress, to achieve the objectives of the Act, Qwest's distinction between types or categories of agreements is meaningless. The benefits of filing, however, foster the development of a competitive market. Dispute resolution provisions, low-level administrative arrangements, or arrangements for contacts between the parties, all should be made public so that the possibility of discriminatory conduct toward any other CLEC is minimized, if not eliminated. Qwest would have this Commission and state regulatory commissions parse words based on unwieldy concepts. Limiting what should be filed will simply encourage carriers to engage in little more than creative titling of "agreements," and subject regulatory commissions to endless arguments of form over substance.

A. Agreements Defining Business Relationships

Qwest argues that "agreements that define business-to-business administrative procedures" do not need to be filed with, or approved by, a state regulatory commission. *Petition for Declaratory Ruling,* pp. 31-4. This raises numerous problems, beginning with a fundamental one: – When does an agreement which defines a business relationship rise to the level where it needs to be filed? According to Qwest, any such agreement, "whether relating to interconnection or other matters," is exempt from regulatory review. *Petition for Declaratory Ruling,* p. 33 (emphasis supplied). Agreements containing only "the most important terms," should be reviewed. *Petition for Declaratory Ruling,* p. 18. Qwest's standard is impossible to put into effect. For example, under Qwest's standard, a

promotion would without doubt not be a "most important term." However, the Commission has previously held that each state commission "must make their own assessment of whether … promotions are discriminatory." Memorandum Opinion and Order, *In Re Application of GTE Corporation,* CC Docket No. 98-184, at ¶ 314.

B. Settlement Agreements

Qwest argues that agreements which resolve past disputes do not need to be filed. There is nothing special about a settlement agreement. *Contra, Petition for Declaratory Ruling,* pp. 34-6. Simply put, a settlement agreement is a negotiated contract. Parties with a dispute enter into an agreement, each side offering and receiving consideration, which is no different than a contract. Settlement agreements which address the subjects enumerated in section 252(c) are subject to regulatory review. *Cf. In the Matter of Investigation of Access and Divestiture Related Tariffs*, FCC 86-54, CC Docket No. 83-1145, 1986 WL 292562 (released January 24, 2986), ¶ 34 (settlement agreement abrogated because the FCC found the rates to be so low that, without modification, they would be unjust and unreasonable in violation of the Communications Act.).

Settlement agreements can have prospective impact. To the extent that any settlement agreement has an on-going impact either to ILEC or CLEC, it should be filed with the proper state regulatory commission to minimize the risk of discriminating against a third-party competitor.

IX. THE ACT DEFERS TO STATE REGULATORY COMMISSIONS IN INTERPRETING INTERCONNECTION AGREEMENTS

In *In the Matter of Starpower Communications*, CC Docket 00-52 (released June 14, 2000), the FCC found held that pursuant to Section 252(e)(5), the "responsibility" of

state regulatory commissions includes resolving disputes seeking interpretation of interconnection agreements. *Starpower* at ¶ 6 (emphasis supplied, citations in original); *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. __, 122 S.Ct. 1753, 1758 (2002). Federal courts have also held that state regulatory commissions have the authority to interpret and enforce previously approved agreements. *Id. at ¶ 6, n. 13 citing Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475 (5th Cir. 2000); Illinois Bell Telephone Company v. WorldCom Technologies, Inc., 179 F.3d 566 (7th Cir. 1999)*("holding that the Act 'specifically provides state commission an important role to play' in interpreting and enforcing interconnection agreements"). The duty to interpret would include the duty to determine what provisions fall within an interconnection agreement. This is common sense.

The United States Supreme Court has found that "[t]o infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive." *ASI Worldwide Communications Corp. v. WorldCom, Inc.* 115 F.Supp2d 201, 206 (D.N.H. 2000) citing *Hillsborough Country, Florida v. Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985). "Such a rule [the Supreme Court concluded] would be inconsistent with the federal-state balance embodied in [the Court's] Supremacy Clause jurisprudence." *Id.* (citations and internal quotes omitted). The Supremacy Clause "invalidates state laws that interfere with, or are contrary to federal law." *Id.* at 205 *citing Hillsborough County,* 471 U.S. at 712 (internal citations omitted).

"Sections 252(b)(1), (b)(4)(C), and (c)(1) require a state commission to resolve any open issues between the parties negotiating an interconnection agreement, and, in

doing so, to ensure that such resolution meets the requirements of section 251. Section 251(d)(3) specifically preserves state authority to impose any "access and interconnection obligations" that are not either inconsistent with or disruptive of the requirements and purposes of the Act." *In the Matter of Bell Atlantic Delaware, Inc. v. Global NAPS, Inc.*, FCC Order No. 98-381, 15 FCCR 12,946, (released December 2, 1999), at ¶ 18. Resolution of the issues presented herein is consistent with the authority vested in the state regulatory commissions to resolve all "open issues" and is consistent with the design of Congress to preserve continued state regulation of local telecommunications markets. This authority would include regulation of agreements voluntarily entered into between Qwest and its competitors that give competitors "the opportunity to compete in the manner contemplated by the Telecom Act." *U.S. West,* 57 F.Supp2d at 1120.

X. THE FCC HAS ALREADY ESTABLISHED A UNIFORM INTERPRETATION OF THE FEDERAL FILING REQUIREMENT

Qwest asserts that the matter presents a question of national importance that requires guidance to "achieve a uniform interpretation of federal law." *Petition for Declaratory Ruling*, p. 4. Compare*, United States Telecom Ass'n*, ___ F.3d ___, 2002 WL 1040574, at *9 (nothing relevant in the Act to support Congress intended national standards *a fortiori*). The Commission has already set forth that uniform interpretation. Congress required "any" agreement, whether negotiated or arbitrated, to be submitted to state commissions for approval, and required states to make publicly available "each" agreement approved. 47 U.S.C. §§ 252(e) and (h). To implement that statutory requirement, the Commission already requires "all" interconnection agreements between an incumbent LEC and another carrier to be submitted to the state commission. 47 C.F.R. § 51.303(a); *First Report and Order,96*-98, ¶¶ 167-168. ("State commissions

should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.") (Emphasis in original). The FCC specifically stated that the "pick and choose" rules, one of the important reasons for the filing requirement, were part of a "procompetitive, national policy framework to adopt national standards to implement section 252(i)." First Report and Order, ¶ 1309. There is no reason for the Commission to retreat from its 1996 interpretation.

CONCLUSION

The answer to the "fundamental question" is that all agreements should have been filed with state regulatory commissions. Hence, there is no genuine dispute before the FCC to resolve which provisions of the agreements require filing and prior approval by the state regulatory commissions. In order to effectuate the purpose of the federal Telecommunications Act of 1996 and transition a monopoly market to a competitive one, all agreements voluntarily negotiated pursuant to section 252(e)(1) must be timely filed with the state regulatory commissions.

Respectfully Submitted,

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